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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-147

TECHNOGRAPH PRINTED CIRCUITS, LTD. and TECHNOGRAPH PRINTED ELECTRONICS, INC.,
Petitioners,

v.

MARTIN-MARIETTA CORPORATION, WESTINGHOUSE ELECTRIC CORPORATION, McDONNELL AIRCRAFT CORPORATION and INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Respondents.

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QUESTIONS PRESENTED

1. Whether a patentee-plaintiff who expressly conceded below that the issue herein was the identical issue decided against him in earlier litigation, can assert a new and specious issue at the Supreme Court level in a belated attempt to obtain reversal of a dismissal on the basis of collateral estoppel?

2. Whether the District Court and the Court of Appeals in this litigation erred in finding as a fact that

the courts had not "wholly failed to grasp the technical subject matter and issues in suit" [1] in earlier litigation in which the now-expired patent here in suit was held invalid?

3. Whether the District Court and the Court of Appeals in this litigation erred in finding as a fact that allegedly crucial new evidence was neither crucial nor suppressed in earlier litigation in which the patent here in suit was invalid?

4. Whether the District Court and the Court of Appeals erred in sustaining a plea of collateral estoppel on the basis of a prior adjudication by the same courts of patent invalidity, because the House of Lords later found a British patent on a different invention to be valid?

STATEMENT OF THE CASE

The instant actions were filed during 1962, prior to the decision by District Judge Watkins in *Technograph Printed Circuits, Ltd.* v. *Bendix Aviation Corp.*, 218 F. Supp. 1 (D. Md. 1963). In that case (hereafter *Bendix*), the patents there in suit were held to be invalid as both anticipated by the prior art and as obvious. Specifically, claims 4, 5, 10, 14, 15 and 16 of Eisler Patent No. 2,706,697 (hereinafter '697) were held invalid. The judgment of invalidity on the basis of obviousness was affirmed per curiam 327 F. 2d 497 (4 Cir. 1964). A petition for rehearing en banc was filed, asserting that *Bendix* was the plaintiffs' "test case". That petition was denied. Petition for certiorari was thereafter denied 379 U.S. 826 (1964).

[1] *Blonder-Tongue Laboratories* v. *University Foundation*, 402 U.S. 313, 333 (1971).

In the instant actions, Judge Watkins ordered plaintiffs to show cause why judgment should not be rendered against them and plaintiffs responded. Thereafter, a motion to dismiss based on a plea of collateral estoppel was filed, because of the final adjudication of invalidity in *Bendix*. That motion was briefed and then held *sub judice* pending argument and decision by this Court in *Blonder-Tongue Laboratories* v. *University Foundation* (hereafter *Blonder-Tongue*). The decision therein issued May 3, 1971 and appears at 402 U.S. 313. It held that, in proper circumstances, a plea of collateral estoppel barred a further trial where a patent previously had been held invalid.

The collateral estoppel issue was again briefed. Plaintiffs filed a memorandum of some 66 pages, accompanied by a large book of attachments of assertedly new evidence. Defendants' response was followed by a 15 page reply memorandum. The District Court fully examined into and rejected each of the plaintiffs' arguments against application of collateral estoppel, in an extensive opinion reported at 340 F. Supp. 423 (1972), and appearing at A 2-32 of the appendix to the petition herein (hereinafter Petition A —). In concluding that plaintiffs here had had a full and fair opportunity in *Bendix* to try the validity of the patent here in suit, the opinion stated:

> "The 'fair opportunity' that plaintiffs had in the *Bendix* case involved numerous pretrial conferences and hearings on preliminary motions all elaborately briefed, and usually fully argued. In addition to twenty-nine days of trial, four days of travel were spent, at the request of counsel, visiting plants of licensees and of *Bendix*. Plaintiffs filed 458 exhibits and defendant 543 exhibits.

These included depositions (including that of Eisler), file wrappers of patents in the hundreds of pages, and pamphlets, printed publications, patents and correspondence, amounting to thousands of pages. After the last day of trial, counsel were permitted to file briefs, totalling in excess of 600 pages, followed by two days of arguments. Submission of new cases, references to modification of plaintiffs' licensing procedures, and new British patent action, thereafter extended over a period of months.

"Highly experienced and efficient counsel certainly by the most exacting standards had a 'fair opportunity' to develop fully their theories and positions. The court was lenient in its rulings on admissibility; and no claim was or is now made that the court excluded any relevant evidence offered." 340 F. Supp. at 426, Petition A 6-7).

The pleas of collateral estoppel were sustained and the actions dismissed.[2]

On appeal to the United States Court of Appeals for the Fourth Circuit, a unanimous court affirmed, in an opinion which again considered and rejected each of plaintiffs' arguments against sustaining the plea of collateral estoppel. 474 F. 2d 798 (1973), Petition A 33-46. The court said at page 811 (Petition A 46):

"We believe the instant cases show precisely why the Supreme Court in *Blonder-Tongue*, overruled *Triplett*[3] and commenced the sustaining of pleas

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[2] These actions originally involved all three of the patents held invalid in *Bendix*. In 1971 the actions were voluntarily dismissed with prejudice insofar as they affected two of these patents, leaving only '697 in suit.

[3] *Triplett* v. *Lowell*, 297 U.S. 638 (1936).

of estoppel by judgment in certain patent cases [footnote omitted]".

In the meantime, a similar action had been filed by plaintiffs against the United States in the Court of Claims. After trial, Commissioner Davis of that court recommended a holding of invalidity in a decision reported *sub nom. Technograph Printed Circuits, Ltd.* v. *United States* at 164 USPQ 584 (1970). The recommendation was then briefed and argued to the Court of Claims but had not been acted upon when the decision of this court in *Blonder-Tongue* was issued. A plea of collateral estoppel on the basis of the prior *Bendix* adjudication was then briefed and argued to the Court but has not as yet been decided.

Plaintiffs had also filed similar actions in the District Court for the Northern District of Illinois. Those actions were converted to a class action involving some 200 defendants. A trial of four weeks duration was had in that court. Parts of the *Bendix* record and the Court of Claims record were included in the record of that trial. Before decision could be reached, *Blonder-Tongue* was decided by this Court. A plea of collateral estoppel was then entered, but plaintiffs requested the Illinois court to await Judge Watkins decision in these cases before ruling on that plea. After Judge Watkins' decision was entered, Judge Will of the Illinois court also sustained the plea of collateral estoppel. His opinion agreed with Judge Watkins' opinion in the instant cases that plaintiffs had a full and fair opportunity to establish the validity of their patents in *Bendix*. *Technograph Printed Circuits, Ltd.* v. *Methode, Inc.*, 174 USPQ 297 (1972). The appeal from that decision to the Court

of Appeals for the Seventh Circuit has been briefed and argued but not as yet decided.

Plaintiffs had also filed a number of actions in California alleging infringement of the same patents. A motion for summary judgment by one of the defendants therein based on *Bendix* was met by a contention that plaintiffs had new evidence which showed the asserted error of the *Bendix* decision. Chief Judge Hall ordered plaintiffs to specify that evidence and its relevancy to the claims of the several patents. For failure to comply with the order he dismissed the California actions, *Technograph Printed Circuits* v. *Packard Bell Electronics Corp.*, 290 F. Supp. 308 (C.D. Calif. 1968). An appeal was taken from that decision and briefed but was held in abeyance pursuant to a stipulation between the parties that the action would be dismissed with prejudice if the Illinois cases were decided against plaintiffs. The Illinois cases having been dismissed, the actions in the Ninth Circuit have also been dismissed.

Respondents are of the view that no further statement of the case is necessary. Petitioners' 19 page "statement" is largely argument, which will be responded to where necessary in the following section of this brief.

ARGUMENT

1. The Issue in This Litigation Concededly Is the Identical Issue Decided in Bendix.

Plaintiffs assert that there is a conflict between the decision below and the decision of the Seventh Circuit in *Bourns Inc.* v. *Allen Bradley Co.*, 178 USPQ 193 (1973), Petition A 57. There is no conflict because

the point in question is not properly presented by the record of this case.

Plaintiffs here seek for the first time to assert that a different issue is involved than in *Bendix*, after failing to identify the new issue in the courts below, and even *conceding* that the issue here is the identical issue decided in *Bendix*. It is axiomatic that a new issue may not be raised for the first time in the Supreme Court. *Virtue* v. *Creamery Package Mfg. Co.*, 227 U.S. 8, 38-9 (1913); *McCullough* v. *Kammerer Corp.*, 323 U.S. 327, 328 (1945), *California* v. *Taylor*, 353 U.S. 553, 557, note 2 (1957); *Lawn* v. *United States* and cases there cited, 355 U.S. 339, 362, note 16 (1958).

Plaintiffs evidently are desperately trying to stave off a final decision in this case after 14 years of litigation in which their involved patent has always been held invalid wherever adjudicated. They seek retrial of the validity of their patent with the concomitant pressures toward settlement adverted to by this Court in deciding that a plea of collateral estoppel was justifiably asserted in patent litigation. *Blonder-Tongue*, 402 U.S. at 338 (1971). The expense of such a retrial is objectively demonstrated here. As plaintiffs themselves say, the retrial of validity in the Illinois case (which occurred prior to *Blonder-Tongue*) took *four weeks*, despite the fact that the *Bendix* record, and the record of the Court of Claims trial, were stipulated into the Illinois action. (Petition 7).

Plaintiffs newly asserted "issue" is that three of the claims asserted in this litigation were not expressly adjudicated in *Bendix*. If there was any merit in this issue it could have been raised in the District Court.

Far from raising the issue, counsel for plaintiffs actually conceded that there was no such issue, by expressly stating that the issue in these cases was the same as in *Bendix*. Plaintiffs so admit in a footnote at page 24 of their petition. They now characterize this as an "aside" but it was a clear concession from which they never attempted to withdraw, even after Judge Watkins said below:

> "It is conceded that the issue in suit is the identical question finally decided against the plaintiffs in *Bendix*, who are the plaintiffs here." 340 F. Supp. at 425, Petition A 5.

If the newly asserted issue of claims not asserted in *Bendix* had any merit, it surely would have been raised in the briefing and argument to the Court of Appeals. It was not. That court said:

> "We turn to the next requirement of *Blonder-Tongue:* that the issues in both proceedings be identical. In *Bendix*, the district court held that claims 4, 5, 10, 14, 15 and 16 of '697 and certain claims of '165 and '960 were invalid for obviousness and anticipation. 218 F.Supp. 1, 31, 58. In the present appeal, no issue is raised concerning '165 or '960. Plaintiffs claim only that claims 4 and 10-14 inclusive of '697 were infringed by the defendants. Although it appears that the validity of claims 11, 12 and 13 of '697 were not specifically mentioned as being invalid in *Bendix*, an examination of those claims shows that they were dependent on claim 10, [footnote omitted], which was held invalid in *Bendix*. Also, the trial court's opinion states that the parties here conceded that the issues in suit were identical to the issues decided against plaintiffs in *Bendix* (340 F. Supp. 423, 425), and *this is not contested on appeal*. Accordingly, the requirement of *Blonder-Tongue*

that the issues be identical in both proceedings has been complied with." 474 F. 2d at 801-2, Petition A 36-7 (emphasis ours throughout).

Rehearing was not requested.

In the circumstances, assertion of this "new" issue at this stage is not a valid reason for granting the petition.

Petitioners also assert (Petition 23-4) a conflict between certain language in 35 U.S.C. § 282 and a footnote statement by the Court of Appeals below (474 F. 2d at 802, Petition A 37) that claims 11, 12 and 13 were invalidated by the holding of invalidity of claim 10 because they are dependent on invalidated claim 10. This assertion is without basis for the following reasons:

1.) the statutory language relied upon was added subsequent both to the issuance of the '697 patent and to the decision of invalidity in *Bendix* and cannot be presumed to be retroactive and,

2.) even if the decision below were in conflict with the law, that holding would not properly be raised here because the basic issue of nonadjudication of claims 11-13 in *Bendix* was waived below.

Plaintiffs' argument (Petition 23-4) omits acknowledgement that the language of § 282 relied upon was added to the statute in 1965. Section 10 of the Act of July 24, 1965 (Public Law 89-83, § 10, 79 Stat. 261) changed the first paragraph of Section 282 of Title 35 to read as follows, the added language being italicized:

> "A patent shall be presumed valid. *Each claim of a patent (whether in independent or dependent form) shall be presumed valid independently*

of the validity of other claims; dependant claims shall be presumed valid even though dependent upon an invalid claim. The burden of establishing invalidity of a patent *or any claim thereof* shall rest on the party asserting it."

The 1965 change was subsequent both to the issuance of the '697 patent in 1955, and the date when the *Bendix* decision became final in 1964. The presumption of course is that the statute was not retroactive, since it was not said to be so. *Union Pacific Railroad Co.* v. *Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913); *Claridge Apartments Co.* v. *Commissioner of Internal Revenue*, 323 U.S. 141, 164 (1944); *Lyon* v. *Bausch and Lomb Optical Co.*, 224 F. 2d 530, 536 (2 Cir. 1955) certiorari denied 350 U.S. 911 (1955).

Moreover, the challenged statement of the Court of Appeals concerning invalidity of claims 11-13 was merely in support of its recognition that the issue in these cases was the same as in *Bendix*, a point already conceded by plaintiffs below. The statement was unnecessary to the court's affirmance of the collateral estoppel holding, because plaintiffs chose not to raise below (and indeed waived) the validity of these claims as an issue separate from the issue in *Bendix*. Whether or not the lower court was right in the challenged statement is not properly before this Court. *Tyrrell* v. *District of Columbia*, 243 U.S. 1, 5-6 (1917).

Finally, the newly asserted issue of the claims not asserted in *Bendix* would be without merit even if presented by the record. A cursory glance at the claims not asserted in *Bendix* (474 F. 2d at 802, Petition A 37) shows that they would necessarily stand or fall with the claims which were expressly adjudicated invalid in *Bendix*, because they recite features

old in the prior art relied on in *Bendix*. All the claims add to adjudicated claim 10 is a recitation that the printing step of that claim is either:

a) letterpress printing—claim 11,
b) offset printing—claim 12, or
c) photomechanical printing—claim 13.

The prior art in *Bendix* showed these various types of printing to be old. As Judge Watkins said, referring to the Stevens and Dallas prior art reference (stated to be the "most significant single reference" in *Bendix*, 218 F. Supp. at 25):

> "Production of the pattern by photomechanical means, or by drawing, stamping or printing directly on the metal, is also clearly disclosed." 218 F. Supp. at 27.

He also quoted the same reference as saying:

> "'Ordinary printers ink may be used for this purpose.'" 218 F. Supp. at 27.

The use of both letterpress and offset printing to deposit printers ink long antedate the birth of anyone who will ever read this brief.

Certainly, if plaintiffs had chosen to assert claims 11-13 in *Bendix*, they would have been held invalid for the same reasons as claim 10. Their recited features were old in the very prior art upon which that claim was held invalid. Plaintiffs would not be entitled to a new trial here merely because some claims were not asserted in *Bendix*, when those claims would stand or fall with claims that were asserted in *Bendix* and found to be invalid. So to hold would place a premium on a tactic by which claims which might be

asserted are held back for later assertion against another defendant, even after the asserted claims are held invalid, thereby to vitiate the salutary effect of *Blonder-Tongue*.

Plaintiffs themselves believed before this new issue was asserted here that claims 11-13 stood or fell with claim 10. That belief was manifested by their express stipulation to that effect in the Illinois litigation. There, a pretrial stipulation signed by plaintiffs' counsel stated:

> "22. Claims 11, 12 and 13 are dependent upon claim 10 and merely recite different specific printing steps, namely, printing by letterpress, offset or photomechanical means, respectively.
>
> 23. Claims 11, 12 and 13 are basically the same as claim 10 except for the specific means of printing; they are contingent upon claim 10 and *will either stand or fall* with claim 10."

This concession explains why no issue was earlier made in this litigation of the fact that claims 11-13 were not expressly asserted in *Bendix*. It illuminates the frantic last-gasp nature of this attempt to stave off an end to this protracted and expensive litigation.

2. Concurrent Findings of the Courts Below, Fully Supported by the Record, Establish that the Courts in Bendix Did Not Wholly Fail To Grasp the Technical Subject Matter and Issues in Suit.

This Court in *Blonder-Tongue*, 402 U.S. at 333 (1971) stated that a plea of collateral estoppel should not be automatically accepted, but that:

> "the patentee-plaintiff must be permitted to demonstrate if he can, that he did not have 'a fair opportunity procedurally, substantively and evi-

> dentially to pursue his claim the first time.' Eisel v. Columbia Packing Co., 181 F Supp 298, 301 (Mass 1960)."

One of the "appropriate inquiries" suggested for the determination of that issue was:

> ". . . whether the opinions filed by the District Court and the reviewing court, if any, indicate that the prior case was one of those relatively rare instances where the courts wholly failed to grasp the technical subject matter and issues in suit . . . ." 402 U.S. at 333.

Plaintiffs contended below that *Bendix* "was one of those relatively rare instances." Both courts below fully considered this contention and all of its bases and found them to be without merit. The opinions below provide ample support for this finding.

Plaintiffs here rely on only two points in support of their argument to the contrary. They assert (Petition 10-15, 24-5) that the courts in *Bendix* failed to understand two prior art references, those of Stevens and Dallas, and Whilems, and that they failed to appreciate the significance of a disclosure in another reference, that to Norris. Judge Watkins carefully examined into each of these contentions and rejected them at 340 F. Supp. 433-36, Petition A 23-8.

The Court of Appeals, by a panel wholly different than the panel which decided *Bendix*, also carefully considered these same contentions and rejected them as follows:

> "Contrary to plaintiffs' assertion, the fact that all contentions concerning anticipation were disposed of without controversy and not considered by this court made it crystal clear that they were no lon-

ger any part of the case. To repeat, during oral argument, counsel for Bendix admitted that the Stevens and Dallas application was not an anticipation of the metallic resist method of '697. This court did not affirm the district court in *Bendix* on the basis of anticipation, but on the ground of obviousness. Thus, the panel did understand the effect of the disclaimer by Bendix's counsel and neither approved of nor considered the district court's holding with reference to anticipation in affirming the decision of invalidity as to '697.

Having again reviewed the actions of the district court in Bendix, we are of opinion that the district judge did not misconstrue Whilems or Stevens and Dallas to the extent that he wholly failed to understand the technical subject matter and issues. Whilems, the Stevens and Dallas application, and Eisler all concerned themselves with the use of various printing and engraving techniques to make electrical circuits. Where the district court erred in *Bendix* on the issue of anticipation was his necessary holding that the precise claims of the Stevens and Dallas application anticipated Eisler '697. Even if Whilems and the Stevens and Dallas application were so misconstrued by the district court, we are of the opinion that the opinion in *Bendix* clearly shows that this was not one of those relatively rare instances where the courts wholly failed to grasp the technical subject matter and issues in suit. [footnote omitted]. The issue of anticipation having been removed, there is no evidence to show that this court wholly failed to grasp the situation in *Bendix*, either the issues or technical subject matter." 474 F. 2d at 805-6, Petition A 40-1.)

As to Norris, the court below said:

"Plaintiffs also raise an issue that the Norris Patent No. 2,282,203 ('203), issued May 5, 1942,

> was improperly considered by the court in *Bendix*. Even if this were true, plaintiffs have shown no reason why they could not have made the same argument to this court in the *Bendix* appeal. They had a fair chance to litigate the issue in *Bendix* and it may not be raised now. In all events, it does not show that the district court, in *Bendix*, did not grasp the technical subject matter or the issues involved. (474 F. 2d at 807, Petition A 42.)

Plaintiffs' contentions here are without support, as demonstrated by the opinions of the lower courts. The overly broad statement by the District Court in *Bendix* that Stevens and Dallas anticipated all three patents in suit was corrected before the Court of Appeals in that case. That Court's opinion demonstrates that it did not rely on that statement, and the Court of Appeals in its opinion below so found, contrary to plaintiffs' unsupported statement to the contrary (Petition 10-11). There is no evidence to support plaintiffs' assertion (Petition 11) as to the Whilems patent, as there is no evidence to support plaintiffs' assertion (Petition 15) that the additional disclosure in Norris was expressly considered by the Examiner in allowing the patent in suit. Indeed, the points concerning Whilems and Norris if valid, could have been made in *Bendix*, where both patents were expressly considered. They were not, doubtless because plaintiffs' "highly experienced and efficient" counsel (340 F. Supp. at 426, Petition A 7) considered them to be without merit.

Plaintiffs' contention that the courts in *Bendix* wholly failed to grasp the technical subject matter and issues in suit is patently without support.

3. The Allegedly Suppressed "Crucial Evidence" in Bendix Was Neither Suppressed Nor Crucial, as Concurrent Findings of the Courts Below Demonstrate.

Judge Watkins' opinion below fully considered each of the 11 items of "newly discovered evidence" upon which plaintiffs relied in the District Court 340 F. Supp. 426-30, Petition A 7-16. As to this evidence he said:

> "Most of this could, with reasonable diligence, have been available for introduction in the Bendix trial; and to the extent that it could not, the Court does not believe that its introduction in the pending cases would change the result reached in Bendix." 340 F. Supp. at 425, Petition A 5.

The 11th and last item of "newly discovered evidence" presented by plaintiffs in the District Court is the only one relied on in the Court of Appeals, and here. That item concerns the Rubin patent, which was owned by *plaintiffs* and was of record in *Bendix*. As Judge Watkins noted below:

> "Whatever arguments could be made therefrom could have been made in that case." 340 F. Supp. 430, Petition A 15.

The item also concerns certain notes made by Rubin on September 30, 1943, prior to the filing of his application for patent on April 5, 1944.

The Court of Appeals considered the notes and plaintiff's contentions that the notes both were suppressed in *Bendix* and were crucial evidence. Both contentions were dismissed as without foundation. 474 F. 2d at 807-10, Petition A 42-45. With respect to the contention of cruciality, the court said:

> "In plaintiffs' appeal in *Bendix*, the point is raised that many who possessed more than ordi-

nary skill in the art had failed to discover the processes described by Eisler's alleged inventions, thus showing non-obviousness. (See brief of Plaintiffs in *Bendix*, p. 30). Rubin's notes were at best cumulative. This court rejected this argument then, and we are of opinion now that the presentation of the Rubin notes would not have changed our decision, especially since they were cumulative evidence of a secondary character. [footnote omitted]. We do not then consider the Rubin notes crucial evidence within the meaning of *Blonder-Tongue*." 474 F. 2d at 808-9, Petition A 43-4.

The Court then went on to find that:

". . . plaintiffs were not deprived of [the notes] without fault of their own." 474 F. 2d at 809, Petition A 44.

Bendix had expressly notified plaintiffs prior to trial that the Rubin invention was conceived as early as September, 1943, thereby placing them on notice of the existence of evidence to that effect. (The notes in question are dated September 30, 1943.) Bendix further described Rubin's invention in a pre-trial outline of his anticipated evidence. Plaintiffs contended before the Court of Appeals, and here, that they were misled by Bendix and by Rubin into not discovering the notes in question before the Bendix trial. The Court of Appeals disposed of that contention as follows:

"We disagree with the contention that plaintiffs were misled by Bendix and Rubin. We believe that Bendix's supplemental answer to their interrogatory filed in January, 1961 and the September 22, 1961 outline of Rubin's expected testimony was more than sufficient to put plaintiffs on notice that Rubin might have notes on processes which were

relevant to the subject matter in suit. Plaintiffs show no basis for their assumption that Rubin wanted more than his usual fee for searching his records. The truth probably is that both parties were uncertain of how Rubin's testimony might affect their case and therefore neither party called him to testify in the *Bendix* trial. Additionally, plaintiffs have offered no plausible excuse whatsoever for their failure to take the discovery deposition of Rubin. In view of the supplemental answer to the interrogatory and the outline of Rubin's proposed testimony, the failure to even attempt to take Rubin's discovery deposition, standing alone, would be sufficient to take the Rubin notes out of the "no fault of their own requirement of *Blonder-Tongue.*" 474 F. 2d at 810, Petition A 45.

Plaintiffs' unsupported conjectures (Petition 17-19, 25) do not provide any basis to disturb this finding. Moreover, they have already achieved as much as they would achieve on a retrial based on the Rubin notes because the courts below have considered these notes and held that they would not have caused a change in the conclusion of invalidity in *Bendix*.

The plea of estoppel was properly sustained in the face of this contention.

4. The Decision of the British House of Lords that a British Patent on a Different Invention Was Valid Does Not Justify Rejection of the Estoppel Plea Here.

Plaintiffs' contention is based on the disposition by the British House of Lords [4] of their British patent on the technique they call "print and etch," to distinguish

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[4] *Mills & Rockley (Electronics) Limited* v. *Technograph Printed Circuits, Limited* 12 Reports of Patent, Design and Trademark Cases 331 (1968).

from the technique of the patent here in suit which they call "print, plate and metallic etch resist." (Petition 9). The relevancy of that contention might be questioned, especially when plaintiffs elsewhere argue that "print and etch" is "irrelevant and immaterial to the patent in suit" (Petition 13).

In any event, the Court of Appeals rejected plaintiffs' contention, expressly agreeing with the District Court's analysis of the House of Lords decision, during which, *inter alia*, it was pointed out that the single most pertinent reference in *Bendix* was not even before the House of Lords. The Court then said:

> "More importantly, allowing relitigation in the light of the House of Lords decision would allow subsequent litigation in light of a decision in a foreign forum which would not have been permitted in a domestic forum by *Blonder-Tongue*. We are not constrained to so weaken the *Blonder-Tongue* ruling by encouraging disappointed plaintiff patent holders to resort to a foreign forum in order to escape the consequences of domestic procedural rules in federal courts set out by the Supreme Court." 474 F. 2d at 810. Petition A 45.

Plaintiffs' contention is without merit.

CONCLUSION

The concurrent holdings of the courts below were correct. This petition should be denied.

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FILE COPY

FILED
SEP 4 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-147

TECHNOGRAPH PRINTED CIRCUITS, LTD. and TECHNOGRAPH PRINTED ELECTRONICS, INC.,

Petitioners,

v.

MARTIN-MARIETTA CORPORATION, WESTINGHOUSE ELECTRIC CORPORATION, McDONNELL AIRCRAFT CORPORATION and INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION,

Respondents.

PETITIONERS' APPENDIX

SIDNEY BENDER

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In the
United States Court of Appeals
For the Seventh Circuit

SEPTEMBER TERM, 1972 — APRIL SESSION, 1973

Nos. 72-1741, 72-1742, 72-1743, 72-1744 and 72-1745

TECHNOGRAPH PRINTED CIRCUITS, LTD., and TECHNOGRAPH PRINTED ELECTRONICS, INCORPORATED,
Plaintiff-Appellants, and *Cross-Appellees*,

v.

METHODE ELECTRONICS, INC.,
Defendant-Appellee,

v.

GTE AUTOMATIC ELECTRIC INCORPORATED,
Defendant-Appellee and *Cross-Appellant*,

v.

WEBCOR ELECTRONICS, INCORPORATED,
Defendant-Appellee,

v.

HOWARD HOLDING COMPANY,
Defendant-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

Nos. 62 C 1761
63 C 36
63 C 111
63 C 142

HUBERT L. WILL, *Judge*.

ARGUED JUNE 11, 1973 — DECIDED AUGUST 27, 1973

Before KILEY and SPRECHER, *Circuit Judges*, and ESCHBACH, *District Judge*.*

*District Judge Jesse E. Eschbach of the Northern District of Indiana is sitting by designation.